

telecommunications competitors. WinStar also supports adoption of a presumption that carriers assume the costs for repairs and payments for damages to MTE owners due to damage caused by a carrier's installation of its facilities.⁶⁸

Likewise, MTE owners' fears that they will be overrun by requests for access from CLECs and/or their buildings will run out of space must not deter the Commission from requiring nondiscriminatory access. As stated in WinStar's Comments, the number of CLECs seeking access and installing equipment in a building will be limited by the ability of the CLECs to receive an adequate return on their investments.⁶⁹ Even Cornerstone Properties et al. recognizes the economic limitation on the number of CLECs that can serve a building.⁷⁰ Moreover, in those states that require MTEs to provide access to competitors on a nondiscriminatory basis, MTE owners have not complained that too many competitors are seeking access to their property. In Texas and Connecticut, for example, where nondiscriminatory access has been required by statute since 1994 and 1995, respectively, "antenna farms" have not "sprouted" on every MTE rooftop. Thus, the Commission need not be concerned with space constraints, as the market itself will limit the number of CLECs able to serve an MTE property. In the unlikely event that space limitations become a problem, it is appropriate to address them in a nondiscriminatory manner and based upon whether access is technically feasible. The Commission also could impose an obligation on carriers that are no longer serving customers in the MTE to remove or sell their equipment.

⁶⁸ Id. at 27.

⁶⁹ Id. at 28.

⁷⁰ Cornerstone Properties et al. Comments, at 23.

MTE owners also assert that a nondiscriminatory access requirement would be anti-competitive because the first competitors would take up all the space in a building and would not allow later competitors to offer service in the building even though those competitors may offer better services and/or prices.⁷¹ As a policy matter, the FCC should act to overcome market failure. As demonstrated above, Commission intervention is necessary to achieve that goal here. Consistent with that goal, the FCC should not limit its actions for the sake of "possible" future competitors. In the Local Competition Order, the FCC addressed a very similar concern raised by utilities. There, the utilities argued that they must be able to reserve some space to meet future demand and not be required to make all their capacity available to competitors in their rights-of-way under Section 224. The FCC stated that:

[r]ecognition of such a [reservation] right . . . could conflict with the nondiscrimination requirement of section 224(f)(1) which prohibits a utility from favoring itself or its affiliates with respect to the provision of telecommunications and video services. In addition, allowing space to go unused when a cable operator or telecommunications carrier could make use of it is directly contrary to the goals of Congress.⁷²

The same principle should apply here. If MTE owners are permitted to reserve space for future telecommunications competitors that competitive carriers desire to occupy now, competition will be hindered.

The Commission may adopt a presumption that technical standards will be followed by CLECs in the installation and maintenance of their facilities in MTEs in order to alleviate the

⁷¹ See, e.g., RAA Comments, at 26.

⁷² In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd 15499, at ¶ 1168 (1996) ("Local Competition First Report and Order").

safety and space concerns of MTE owners. In the Local Competition Order, the Commission adopted a general rule that utilities could continue to rely on the National Electric Safety Code ("NESC") to prescribe standards with respect to capacity, safety, reliability, and general engineering principles.⁷³ The Commission also stated that other industry codes would be presumed reasonable if shown to be widely accepted objective guidelines for installation and maintenance of electrical and communications facilities.⁷⁴ The Commission went on to state that aside from the general guidelines, it will not adopt specific rules to determine when access may be denied because of capacity, safety, reliability, or engineering concerns.⁷⁵ The Commission recognized that safe and reliable provision of utility services is important, but the 1996 Act "reinforces the vital role of telecommunications and cable services."⁷⁶ The Commission explicitly acknowledged that the 1996 Act reflects Congressional intent that utilities must be prepared to accommodate requests for attachments by telecommunications carriers and cable operators.⁷⁷

The National Electrical Code ("NEC"), developed by the NEC Committee of the American National Standards Institute ("ANSI") contains standards for installation of electrical and communications facilities in buildings. Just as the NESC applies to pole attachments, the NEC applies to in-building installations. Also, the NEC refers the reader to nationally recognized industry standards (also published by ANSI): (1) the Commercial Building Telecommunications Wiring Standard; (2) the Commercial Building Standard for Telecommunications Pathways and

⁷³ Id. at ¶ 1151.

⁷⁴ Id.

⁷⁵ Id. at ¶ 1158.

⁷⁶ Id.

⁷⁷ Id.

Spaces; and (3) the Residential and Light Commercial Telecommunications Wiring Standard. These standards will assist MTE owners and telecommunications carriers in ensuring that access is not disruptive to the building's tenants and that equipment is installed in an efficient and space conserving manner.

The Building Owners and Managers Association ("BOMA"), a member of the "Real Access Alliance," has recognized that national standards are a viable means to handle concerns regarding fire safety.⁷⁸ Thus, agreement by telecommunication carriers that are seeking nondiscriminatory access to MTEs to follow industry standards should be sufficient to dispel concerns about capacity, safety, reliability, and engineering issues. Both BOMA and the FCC have acknowledged that such standards are an appropriate solution.

V. THE COMMISSION HAS THE JURISDICTION AND AUTHORITY TO GRANT CLECs ACCESS TO MTEs.

A. The FCC Has Jurisdiction Over MTE Owners And Managers And Intra-Building Telecommunications Facilities.

The Commission has significant discretion and authority to regulate within the scope of its expertise. The Commission's scope of authority is not limited to only those matters expressly stated in the Communications Act. Rather, Congress gave the Commission broad authority to regulate the entire communications industry in order to ensure that the goals of the Communications Act are being met.

Section 2(a) of the Communications Act provides the FCC with its subject matter jurisdiction over all interstate and foreign communications by wire and radio.⁷⁹ Section 3(52)

⁷⁸ See Potomac Currents Newsletter discussing BOMA's efforts regarding the institution of a national fire standard, attached hereto as Exhibit 4.

⁷⁹ 47 U.S.C. § 152(a).

defines wire communication or communication by wire as "the transmission of writing, signs, signals . . . including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."⁸⁰ The definition of radio communication in Section 3(33) includes an identical reference to instrumentalities concerning transmission by radio.⁸¹ Intra-MTE wire, riser conduits, and other facilities in buildings are "instrumentalities" for the provision of interstate communications services to consumers in MTEs.⁸² Access to the instrumentalities in an MTE is an integral part of and inseparable from providing telecommunications services in MTEs. The Commission thus has jurisdiction over these facilities pursuant to Section 3(33) and 3(52) as set forth above.⁸³

Moreover, Section 2(a) provides the FCC with in personam jurisdiction over all persons engaged within the United States in interstate and foreign communication by wire or transmission of energy by radio.⁸⁴ The "all instrumentalities" clause of Sections 3(33) and 3(52) permits the Commission to prescribe regulations that are binding upon MTE owners and managers. As

⁸⁰ Id. § 153(52) (emphasis added).

⁸¹ Id. § 153(33).

⁸² Similarly, the Commission has held that "the provision of central office space for physical collocation is incidental to communications, thus rendering it a communications service under Section 3 of the Communications Act" It further explained that "[o]fferings are incidental to communications and therefore are communications themselves, if they are an integral part of, or inseparable from, transmission of communications." In re Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, Second Report and Order, 12 FCC Rcd 18730, at ¶ 20 (1997).

⁸³ Communications within MTEs are not severable from interstate communications and, therefore, are subject to the Commission's jurisdiction.

⁸⁴ But see RAA Comments, at 34; Cornerstone Properties et al. Comments, at 13 (claiming that the Commission does not have jurisdiction over MTE owners).

explained above, access to certain facilities such as intra-building wire or riser conduit within MTEs is instrumental to providing communications services to tenants in MTEs. To the extent that MTE owners and managers either control or own these "instrumentalities," they are subject to the FCC's jurisdiction. In sum, a person is "engaged in communication by wire [or radio]" and therefore is subject to the Commission's jurisdiction under Section 2(a), by virtue of owning or controlling an "instrumentality" of communication by wire or radio -- in this case, the intra-MTE wire, riser conduit and other facilities.⁸⁵

B. Several Provisions Of The Act Provide The Commission Ancillary Authority To Adopt A Nondiscriminatory Access Provision.

Sections 4(i), 201(b), and 303(r) provide the Commission its broad rulemaking authority over interstate communications and persons coming within its jurisdiction.⁸⁶ The Supreme Court has held that the Commission may regulate activities and persons when such regulation is

⁸⁵ The Commission previously exercised in personam jurisdiction over MTE owners when it preempted lease arrangements that prohibited tenants from using Section 207 devices within their leasehold. In re Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices, Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, Second Report and Order, 13 FCC Rcd. 23874, at ¶ 29 (rel. Nov. 20, 1998) ("OTARD Second Report and Order"). In addition, the Part 68 rules demonstrate the Commission's in personam jurisdiction over MTE owners where, for example, the Commission prescribes limits on a MTE owner's ability to determine the location of a demarcation point. See 47 C.F.R. § 68.3.

⁸⁶ Section 4(i) provides the Commission extensive authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Section 201(b) states that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." Similarly, Section 303(r) grants broad authority to the Commission for the regulation of the use of radio spectrum and specifically permits the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act,"

reasonable ancillary to accomplish the goals of the Communications Act. Even where the Communications Act does not expressly regulate, the courts have recognized and the Commission has exercised its "ancillary" jurisdiction to regulate.⁸⁷ Most recently, the Supreme Court explained the broad basis of the Commission's authority, noting that "even though 'Commission jurisdiction' always follows where the Act 'applies,' Commission jurisdiction (so-called 'ancillary' jurisdiction) could exist even where the Act does not 'apply.'"⁸⁸ The provision of nondiscriminatory MTE access is within the Commission's ancillary jurisdiction.

First, Section 224 provides telecommunications competitors access to utilities' "rights-of-way," among other things.⁸⁹ The intent of this Section is to ensure that competitors have access to essential facilities to provide competitive services. Even if Section 224 were thought not to apply directly, essential facilities, such as intra-building wire, riser conduits, and NIDs owned or controlled by MTEs, are reasonably ancillary to the requirements found in Section 224. Furthermore, it is reasonably ancillary to regulate the salient activities of MTE owners and managers because they own or control these essential components.

Second, Section 706 requires the Commission to promote the deployment of advanced telecommunications capability to all Americans in a timely fashion.⁹⁰ The Commission recognized

⁸⁷ See United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (holding that the Commission's authority to regulate cable was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.").

⁸⁸ AT&T Corp. v. Iowa Utilities Bd., 142 L.Ed.2d 834, 850, 525 U.S. -- (1999) (original emphasis).

⁸⁹ See 47 U.S.C. § 224.

⁹⁰ See Section 706(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 153 (1996).

that if a significant portion of units in MTEs is not accessible to competitive providers of broadband, that fact could seriously detract from local competition in general and the achievement of broadband availability to all Americans in particular.⁹¹ WinStar, as well as other facilities-based carriers, are providing advanced services to consumers; however, as WinStar has demonstrated, access to MTE tenants is necessary and in many instances is difficult or impossible to obtain. Thus, Section 706 provides the Commission with the authority directly or as a matter of ancillary jurisdiction to implement a nondiscriminatory access requirement to promote the deployment of advanced telecommunications capability.

Finally, Section 207 provides that the Commission shall:

promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.⁹²

The Commission determined that it would not narrowly interpret Section 207 to limit those video services to only specific video systems ostensibly described in the statute. Rather, it took an expansive and realistic view of the types of video programming service providers intended to be protected by Section 207 and included video service providers which also act as fixed service providers, LMDS licensees.⁹³ Fixed wireless carriers may offer services like those contemplated

⁹¹ In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Report, 14 FCC Rcd 2398, ¶ 104 (1998).

⁹² Section 207 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 114 (1996). As demonstrated above, pursuant to Section 207, the Commission has exercised direct jurisdiction over MTE owners and managers.

⁹³ See Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air

by Section 207 through the provision of Internet access or other broadband services.⁹⁴ Indeed, fixed wireless carriers will compete against those video providers, like LMDS licensees, that already receive protection under Section 207, but are permitted to offer a broader array of services.⁹⁵ Just as the Commission used its authority to expand the scope of Section 207 to include wireless devices reasonably related to the statute, the Commission has the authority to construe Section 207 to include all fixed wireless devices within its ambit. Alternatively, it can articulate a regulatory program for other services patterned after its Section 207 regulations, based upon ancillary jurisdiction. Section 207 provides the Commission with the underlying principles to restrict all unreasonable or discriminatory MTE prohibitions on fixed wireless devices and to require nondiscriminatory MTE access for all fixed wireless providers.⁹⁶

C. The Commission Is Not Prohibited By The Fifth Amendment To Institute A Nondiscriminatory Access Provision.

Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276, at ¶ 30 (1996)("OTARD Order").

⁹⁴ While the Commission declined to adopt a broad definition of "video programming services," it did determine to include those services that offer services similar to television broadcast stations. Technology is rapidly changing, and the Internet is beginning to carry broadcast-type services. The Commission should acknowledge this and include all (not just LMDS) facilities-based carriers offering Internet services within the ambit of Section 207.

⁹⁵ In re Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for LMDS and for Fixed Satellite Services, First Report and Order and Fourth Notice of Proposed Rulemaking, 11 FCC Rcd. 19005, at ¶ 15 (1996)(describing the "wealth of innovative services" made possible by LMDS).

⁹⁶ Consistent with this analysis, the Commission also must grant the outstanding Joint Petition for Reconsideration of the Commission's Second Report and Order in the over-the-air reception devices ("OTARD") proceeding. See WinStar Comments, at 70-73.

1. **The Per Se Takings Analysis In Loretto v. Teleprompter Is Inapplicable.**

Contrary to the claims of MTE owners,⁹⁷ a nondiscriminatory MTE access requirement would not involve a per se takings like the statute in Loretto v. Teleprompter.⁹⁸ This is because a nondiscriminatory MTE access requirement would apply to an MTE owner only upon the MTE owner voluntarily permitting one telecommunications provider to enter and occupy his property. Thus, it would not amount to a compelled physical invasion by the government.⁹⁹ Rather, a nondiscriminatory MTE access requirement would merely regulate the terms and conditions of that occupation and would not implicate the per se analysis of Loretto.

Caselaw confirms that the per se takings analysis of Loretto is inappropriate for a nondiscriminatory MTE access requirement. In Yee v. City of Escondido, California,¹⁰⁰ the property owners alleged that the combination of rent control and the Mobile Home Residency Law was a per se taking. While the laws amounted to a physical occupation of property, the Court found that the property owners had voluntarily opened their property and could choose to refuse access to all mobile home owners to avoid the occupation.¹⁰¹ The Supreme Court held that the laws at issue in Yee merely regulated the property owners' use of their land and was not a per

⁹⁷ See, e.g., RAA Comments, at 37.

⁹⁸ 458 U.S. 419 (1982) (holding that a New York statute that prohibited landlord interference with installation of cable television facilities on the landlord's property involved a permanent physical occupation and, therefore, was a takings). It should be noted that the Court did not reach whether it was an unconstitutional takings because it did not determine whether the compensation provided was just.

⁹⁹ See also Competition Policy Institute Comments, at 10-11.

¹⁰⁰ 503 U.S. 519, 528 (1992).

¹⁰¹ Yee, at 529.

se taking.¹⁰² Moreover, the Court found that "[b]ecause they voluntarily open[ed] their property to occupation by others, petitioners [could] not assert a per se right to compensation based on their inability to exclude particular individuals."¹⁰³

In Thomas v. Anchorage Equal Rights Commission, the U.S. Court of Appeals for the Ninth Circuit applied the Yee volitional analysis to a nondiscriminatory access requirement which mandated that landlords could not discriminate against unmarried tenants.¹⁰⁴ Thomas noted the Supreme Court's conclusion in Yee that property owners do not possess a per se Takings Clause right to choose their incoming tenants, and it limited its Takings Clause analysis to whether the nondiscriminatory requirement was a regulatory taking pursuant to the factors outlined in Penn Central Transportation Co. v. City of New York.¹⁰⁵

Moreover, a nondiscriminatory MTE access requirement is consistent with the Commission's Second Report and Order in the OTARD proceeding. There, the Commission acknowledged that "once a property owner voluntarily consents to the physical occupation of its property it can no longer claim a per se taking if government action merely affects the terms and conditions of that occupation [T]he government has broad power to regulate interests in

¹⁰² Id.

¹⁰³ Id. at 531 (citing Heart of Atlanta Motel v. U.S., 379 U.S. 241, 261 (1964) (holding that the Civil Rights Act of 1964, which mandated that restaurants operating in interstate commerce could not discriminate on the basis of race, was not an unconstitutional takings without just compensation)).

¹⁰⁴ 165 F.3d 692, 708 (9th Cir. 1999).

¹⁰⁵ 438 U.S. 104 (1978). The Penn Central factors are (1) the character of the government action; (2) the economic impact of the regulation; and (3) the regulation's interference with reasonable investment-backed expectations. Id. at 124. In its review of the Penn Central factors, the Thomas court gave more weight to the fact that the nondiscriminatory access requirement imposed a physical occupation of the property when it considered the first factor, the character of the government action. See Thomas, 165 F.3d at 709.

land that interfere with valid federal objectives."¹⁰⁶ With a nondiscriminatory MTE access provision, the landlord retains the power to restrict access for all telecommunications providers equally, and as a result, may avoid the nondiscriminatory MTE access requirement altogether. For this reason, a nondiscriminatory access requirement is unlike Section 224, which is a mandatory requirement to allow telecommunications carriers and cable operators to occupy utility poles, ducts, conduits, and rights-of-way. Thus, the U.S. Court of Appeals for the Eleventh Circuit's recent determination that Section 224 was a per se takings is inapplicable here.¹⁰⁷

Commenters argue that a nondiscriminatory access requirement is a per se takings because it would require MTE owners to lease additional space from that already occupied by telecommunications providers in the building.¹⁰⁸ In other words, they claim that a nondiscriminatory access requirement would require MTEs to set aside additional space for telecommunications providers. Others suggest that the MTE owners had no choice but to allow the first telecommunications provider to access their properties because the incumbents were monopolies and the MTE owners had to let the ILECs in or their properties would not have been marketable to tenants.¹⁰⁹ They claim that if there had been telecommunications competitors or if they had known that future competitors might be able to gain access pursuant to the incumbent's

¹⁰⁶ OTARD Second Report and Order, at ¶ 22; but see RAA Comments, at 38 (claiming that the Commission does not have the authority to regulate the terms of a lease if it specifically prevents the use of an antenna within the leasehold).

¹⁰⁷ Gulf Power Co. v. U.S., No. 98-2403, slip op. (11th Cir. Sept. 9, 1999). It should be noted that the court also found that Section 224 was not a violation of the Fifth Amendment's Takings Clause because the statute provided a means for just compensation.

¹⁰⁸ See National Association of Counties Comments, at 12.

¹⁰⁹ See, e.g., RAA Comments, at 39.

rights, then they would have placed conditions on the incumbent and charged fees for incumbent access.

The Commission must reject these claims. Where a property owner voluntarily opened his property to the public and, therefore, was required to accommodate disabled persons pursuant to the Americans with Disabilities Act ("ADA") (legislation intended to prevent physical access discrimination for disabled persons), it was not a per se takings for the government to require the owner to set aside additional property in his restaurant for the accommodation of a larger restroom for disabled persons.¹¹⁰ Specifically, the restaurant owner had to set aside 20 seating places in order to enlarge a restroom to comply with the ADA's regulations. The court held that this was not a per se takings as in Loretto but merely regulated the use of the property.¹¹¹ The court likened the ADA requirements to zoning regulations. Similarly, the Commission may require an MTE owner to accommodate other telecommunications carriers once the owner voluntarily allows one carrier on his property, even if it results in the occupation of additional space. Such occupation will not result in a per se takings of MTE property.

It is nonsensical for MTE owners to argue that economically they did not have a choice and had to allow incumbent providers access to their properties (otherwise their properties would not have been marketable); therefore, the government cannot regulate the terms and conditions of

¹¹⁰ Pinnock v. International House of Pancakes Franchisee et al., 844 F. Supp. 574, 586 (1993).

¹¹¹ While the court fails to acknowledge that the Yee decision limits the Loretto per se analysis to those situations where the government initially compels a property owner to allow third parties to occupy private property, it is significant that the court comes to the conclusion that a nondiscriminatory access requirement is not analyzed pursuant to the per se analysis of Loretto.

that access. This is equivalent to a restaurant owner arguing that his restaurant would not be marketable unless he invited customers; therefore, the government cannot regulate the terms and conditions by which customers are accommodated in his restaurant. The fact is that MTE owners did allow telecommunications carriers onto their properties, and the Commission may regulate the terms and conditions of that access as a consequence.

2. A Nondiscriminatory Access Requirement Is Not A Regulatory Taking.

A nondiscriminatory access requirement is not a "regulatory" taking. To determine whether a regulatory taking has occurred, a court will consider the three factors from Penn Central: (1) the character of the government action; (2) the economic impact of the regulation; and (3) the regulation's interference with reasonable investment-backed expectations.¹¹² As stated in WinStar's Comments, a nondiscriminatory access requirement promotes the substantial government interest of choice and competition in the telecommunications marketplace.¹¹³ The result will be more competition for incumbents, just as Congress intended with the enactment of the 1996 Act. While an additional physical occupation may occur in some cases, such occupation will not prevent MTE owners from leasing space to residents or businesses. Likewise, the economic impact of the regulation will be minimal, especially when one considers the fact that the value of the property is enhanced by competitive telecommunications providers offering less expensive telephone and advanced services to tenants. Moreover, additional telecommunications providers will not prevent MTE owners from achieving the economic value of their commercial or residential lease space.

¹¹² 438 U.S. 104, 124 (1978).

¹¹³ WinStar Comments, at 41.

Contrary to some of the MTE owner comments, investment-backed expectations will not be altered, as fixed wireless carriers are willing to compensate MTE owners for providing nondiscriminatory access to their buildings. It should be noted that most buildings were built before the advent of telecommunications competition; thus, these building owners have no investment-backed expectation of compensation for such use. Nevertheless, even where there are some investment-backed expectations of compensation for telecommunications access, a nondiscriminatory access requirement would not prohibit MTE owners from charging reasonable access fees. Rather, it would prohibit MTE owners from charging discriminatory fees.

3. Because A Nondiscriminatory Access Requirement Would Not Result In A "Takings," Bell Atlantic Telephone Companies v. FCC Is Inapposite.

In Bell Atlantic Telephone Companies v. FCC,¹¹⁴ the U.S. Court of Appeals for the D.C. Circuit held that where an agency authorizes "an identifiable class of cases in which the application of a statute will necessarily constitute a taking," the agency's authority is narrowly construed to defeat such an interpretation unless the statute grants express or implied authority to the agency to effect the taking.¹¹⁵ Commenters argue that the precedent of Bell Atlantic prohibits the Commission from promulgating a nondiscriminatory access requirement.¹¹⁶ However, WinStar has demonstrated that a nondiscriminatory MTE access requirement would not constitute a taking. For this reason, it would be strained to classify it to "necessarily" constitute a takings.

¹¹⁴ 24 F.3d 1441 (D.C. Cir. 1994).

¹¹⁵ Id. at 1445. Implied authority may be found only where "'the grant [of authority] itself would be defeated unless [takings] power were implied.'" Id. at 1446 (quoting Western Union Tel. Co. v. Pennsylvania R.R., 120 F. 362, 373 (C.C.W.D. Pa.), aff'd, 123 F. 33 (3d Cir. 1903), aff'd, 195 U.S. 540, (1904)).

¹¹⁶ RAA Comments, at 40-41; Community Associations Institute et al. Comments, at 15.

Thus, the precedent in Bell Atlantic is inapplicable in the context of a nondiscriminatory MTE access requirement.¹¹⁷

Even in the unlikely event that a nondiscriminatory MTE access requirement is deemed a takings, Bell Atlantic is inapposite. The "Real Access Alliance" argues that Bell Atlantic applies because the Communications Act does not expressly grant the Commission the "takings" authority to require MTEs to provide access to telecommunications competitors on a nondiscriminatory basis.¹¹⁸ In addition, it asserts that the implication of such a takings will be "billions of dollars" owed to MTEs and that the Bell Atlantic court's concern that the Treasury would be exposed to liability without Congressional action will be implicated.¹¹⁹ Furthermore, the "Real Access Alliance" states that Congress has the exclusive power over appropriations and the Commission is prohibited by the Anti-Deficiency Act from "spending or obligating funds in excess of [its] annual appropriation" as determined by the Supreme Court in Hercules v. United States.¹²⁰

However, the 1996 Act provides the Commission with the authority to effect a taking and to establish the minimum level of just compensation. First, Section 706 specifically directs the Commission to encourage the deployment of advanced telecommunications capability using, inter alia, "methods that remove barriers to infrastructure investment."¹²¹ Upon any determination that advanced telecommunications capability is not being deployed to all Americans in a reasonable

¹¹⁷ See also WinStar Comments, at 43-45.

¹¹⁸ RAA Comments, at 40-41.

¹¹⁹ See id. at 42-44; Cooper Carvin & Rosenthal Attachment, at 37.

¹²⁰ RAA Comments, at 42-46.

¹²¹ Section 706(a) of the Telecommunications Act of 1996 Pub. L. No. 104-104, 110 Stat. 56, 153 (1996).

and timely fashion, the Commission is to "take immediate action . . . by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."¹²²

Fixed wireless licensees provide advanced telecommunications services. MTE access restrictions are barriers to the delivery of those services and impede competition in the telecommunications market. Section 706 gives the Commission the necessary authority to remove those restrictions and require access. Thus, if a requirement for access is deemed a taking, then the Commission's authority to effect the taking is reasonably granted by Section 706.¹²³

Second, the Commission has the authority to effect a taking by requiring nondiscriminatory MTE access to preserve the principles embodied in Section 254.¹²⁴ Section 254(a) charges the Commission with creating a Joint Board on universal service and implementing the Joint Board's recommendations.¹²⁵ Pursuant to the Joint Board's Recommended Decision, one of the principles that must guide a universal service plan is competitive neutrality.¹²⁶ Without takings authority, some carriers would be precluded from providing tenants in MTEs with those services eligible for universal service funding -- a result squarely at odds with the guiding principle of competitive neutrality. Takings authority in the MTE access context must be implied in Section 254 in order for the Commission to implement a competitively neutral universal service

¹²² Id. § 706(b).

¹²³ See Bell Atlantic, at 1446.

¹²⁴ 47 U.S.C. § 254.

¹²⁵ Id. § 254(a).

¹²⁶ Pursuant to the Joint Board's recommendation, and as directed by the statute, the Commission added the principle of "competitive neutrality" to those enumerated in §§ 254(b)(1)-(6). See Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776 at ¶¶ 46-47 (1997) ("Universal Service Order"); Federal-State Joint Board on Universal Service, Recommended Decision, 12 FCC Rcd 87 at ¶ 23 (1996).

scheme (pursuant to the Joint Board's Recommended Decision) and thereby follow its statutory mandate.

In fact, the 1996 Act, as a whole, evidences a Congressional goal of providing access to competitive sources of telecommunications services for all Americans.¹²⁷ Congress clearly intended for all Americans to enjoy local competition, including those working and living in MTEs. Indeed, the Commission has specifically found that the benefits of Section 207 were intended to reach consumers in MTEs.¹²⁸ Thus, the 1996 Act adequately demonstrates the Commission authority to implement a nondiscriminatory MTE access requirement, even if such a requirement is determined to be a "takings."¹²⁹

A subsequent decision to Bell Atlantic by the D.C. Circuit explained that a narrow construction of a statute to avoid constitutional difficulties is warranted "if such a construction is not plainly contrary to the intent of Congress."¹³⁰ A narrow construction of the Communications Act to preclude a Commission-imposed nondiscriminatory MTE access rule would be plainly

¹²⁷ Joint Statement of the Managers, H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., at 113 (1996)(noting that the 1996 Act was intended "to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . .").

¹²⁸ See generally OTARD Second Report and Order.

¹²⁹ Indeed, the 1996 Act provides the Commission specific authority, not addressed by the Bell Atlantic court, which permit the FCC to require and oversee the occupation of an entity's property by third parties to accomplish competition in the telecommunications market. See Teligent Comments, at 70 (discussing Section 251(c)(6), which provides for mandatory physical collocation in the ILEC central offices, and Section 224(f)(1), which requires utilities to provide telecommunications carriers and cable operators with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility).

¹³⁰ Chamber of Commerce of the United States v. FEC, 69 F.3d 600, 605 (D.C. Cir. 1995)(citing Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994)).

contrary to the intent of Congress in light of the 1996 Act. Hence, Bell Atlantic is inapplicable, and the Commission must narrowly construe its holding.

Moreover, the "Real Access Alliance's" fears that the FCC would be facing tens of billions of dollars in claims due to a nondiscriminatory access requirement are overstated.¹³¹ First, fixed wireless carriers are willing to provide reasonable, nondiscriminatory compensation to building owners for MTE access.¹³² Second, the concern that compensation will be inadequate is guarded against by the ability of parties to seek judicial relief under the Tucker Act.¹³³ As demonstrated in WinStar's Comments, the Tucker Act remedy is available and is intended to provide parties a means to file claims against the U.S. when a government agency has "taken" property without providing just compensation.¹³⁴ Moreover, the Anti-Deficiency Act would not be a limitation on Tucker Act claims resulting from a nondiscriminatory MTE access requirement. The Anti-

¹³¹ See RAA Comments, Cooper Carvin & Rosenthal Attachment, at 37.

¹³² Certainly, fixed wireless carriers are willing to pay the rates currently paid by ILECs (which should be deemed just compensation for Fifth Amendment purposes). Indeed, reasonable compensation of \$1 per building has survived judicial scrutiny for building access in the cable television context. See WinStar Comments, at 46-47 (discussing the fact that the compensation provided in Loretto (a \$1 per building) was never judicially determined to be unreasonable and still is the compensation provided by cable operators today in New York).

¹³³ See 28 U.S.C. 1491(a)(1). See Williamson County at 194-195 (1985)(quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013, 1018, n.21)("If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."); see also Presault v. ICC, 494 U.S. 1, 12 (1990)(noting that Congress must exhibit an "unambiguous intention to withdraw the Tucker Act remedy . . . to preclude a Tucker Act claim.")(citations omitted). Nothing in the Communications Act indicates that Congress has foreclosed a Tucker Act remedy. See Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1445, n.2 (D.C. Cir. 1994).

¹³⁴ See United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, at 128-129 (1985) (explaining that the Tucker Act presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute).

Deficiency Act bars agencies from entering into contracts that would require the government to pay more than Congress has appropriated for the agency.¹³⁵ A government contract would not be at issue in the unlikely event that a Tucker Act claim is made pursuant to a nondiscriminatory MTE access requirement.

VI. THE COMMISSION MUST FULLY IMPLEMENT SECTION 224 AND REQUIRE UTILITIES TO PROVIDE ACCESS TO THEIR RIGHTS-OF-WAY AND CONDUIT IN MTEs.

A. Section 224 Benefits All Telecommunications Carriers.

Section 224(f)(1) provides that "[a] utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."¹³⁶ Thus, all "telecommunications carrier[s]," which the Act defines as "any provider of telecommunications services,"¹³⁷ are entitled to access under Section 224.

Accordingly, the FCC has held that "[w]ireless carriers are entitled to the benefits and protection of Section 224" and has rejected arguments that Congress intended Section 224 only to cover wire communications.¹³⁸ Nevertheless, some commenters continue to insist that Section 224's benefits and protections do not apply to wireless carriers.¹³⁹

¹³⁵ Hercules v. United States, the case cited by the "Real Access Alliance" merely stands for the proposition that an agency cannot enter into a contract which provides for open-ended indemnification agreements; therefore, they cannot be implied-in-fact in government contracts. See 516 U.S. 417, 134 L Ed 2d 47, 58 (1996).

¹³⁶ 47 C.F.R. § 224(f)(1)(emphasis added).

¹³⁷ Id. § 153(44). The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used," and "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Id. §§ 153(46), 153(43).

¹³⁸ In re Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments, Report

This interpretation of Section 224 is incorrect. The provision defining which entities are subject to the terms of Section 224, *i.e.*, those utilities "who own[] or control[] poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communication,"¹⁴⁰ does not govern which telecommunications carriers are entitled to access. Instead, the Commission must look to the Act's expansive definition of "telecommunications carrier."¹⁴¹ Nothing in the Act or its legislative history suggests that Congress intended to exclude wireless carriers from the definition of "telecommunications carrier" or from the benefits and protections of Section 224. Such an interpretation (or willful misinterpretation) would be wholly contrary to the pro-

and Order, 13 FCC Rcd. 6777, at ¶ 39 (1998) ("Pole Attachments Report and Order"); see also Local Competition First Report and Order, at ¶ 1186 (Section 224 "does not describe the specific type of telecommunications or cable equipment that may be attached when access to utility facilities is mandated . . . establishing an exhaustive list of such equipment is [not] advisable or even possible.").

¹³⁹ UTC/EEI Comments, at 12-13; Electric Utilities Coalition Comments, at 6; American Electric Power Service Corp. et al., Comments, at 22; GTE Comments, at 26-27. For example, GTE argues that "[i]f Congress conceived of bottleneck facilities outside the wireline context, it would have drafted the statute to apply to all utilities, not just those that control pathways for 'wire communications.'" GTE Comments, at 28.

Similarly, some commenters argue that only those poles, ducts, conduit, and rights-of-way actually used for wire communications by utilities must be made available to telecommunications carriers on a nondiscriminatory basis. See Cincinnati Bell Comments, at 5; Entergy Service, Inc. Comments, at 1-2. However, the use of the phrase "in whole or in part" in Section 224(a)(1) makes clear that "Congress did not intend for a utility to be able to restrict access to the exact path used by the utility for wire communications." Local Competition First Report and Order, at ¶ 1173. Thus, "use of any utility pole, duct, conduit, or right-of-way owned or controlled by the utility, including those not currently used for wire communications," triggers access to all poles, ducts, conduits, and rights-of-way owned or controlled by it. Id.

¹⁴⁰ 47 U.S.C. § 224(a)(1).

¹⁴¹ 47 U.S.C. § 153(44).

competitive intent of the 1996 Act.¹⁴² Thus, the Commission has correctly concluded that all telecommunications carriers -- including carriers using wireless technologies to reach tenants and residents of MTEs -- "are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers."¹⁴³

B. All Utility Rights To Use Or Pass Over Property Are Subject To Section 224.

Congress extended Section 224 to telecommunications competitors in the 1996 Act so that they would not have to engage in obtaining separate rights-of-way from municipalities and private landowners. Congress recognized that without the ability to access those rights already acquired by utilities (which were obtained due to their monopoly positions and at ratepayer expense), telecommunications competitors would have difficulty competing in a timely manner. In essence, Section 224 seeks to avoid the unnecessary duplication of rights needed to promote facilities-based competition. Any requirement that telecommunications carriers engage in obtaining their own rights-of-way would be contrary to Congress' intent in extending Section 224 to telecommunications carriers. Thus, the Commission should not restrict the types of rights-of-way to which Section 224 applies.

¹⁴² See Joint Statement of the Managers, H.R. Conf. Rep. No. 104-485, 104th Cong., 2d Sess., 113, at 206 (1996)("This section expands the definition of 'pole attachment' to include attachments by all providers of telecommunications services.")(emphasis added).

¹⁴³ Pole Attachments Order, at ¶ 2; see also Notice, at ¶ 36.

1. Section 224 Includes Both Private And Public Property.

Section 224 expressly mandates that utilities provide telecommunications carriers nondiscriminatory access to "right[s]-of-way" that are "owned or controlled" by them.¹⁴⁴ Although the statute does not define the term "rights-of-way," it does make clear that access must be given to "any" right-of-way that a utility owns or controls.¹⁴⁵ Utilities, ILECs, and MTE owners seek to impose artificial limitations on the rights granted to competitors under the Act.

Some commenters argue that Section 224 only applies to public, outdoor rights-of-way, not private, intra-MTE rights-of-way.¹⁴⁶ Congress's use of the term "rights-of-way" in Section 224 without qualifiers indicates that the term encompasses both public and private rights-of-way. Where Congress intended to cover only public rights-of-way, it said so explicitly.¹⁴⁷ Thus, Section 224 contemplates access to rights-of-way over the property of private land owners, if owned or controlled by the utility. The restrictive approach advocated by the comments of utilities, ILECs, and MTE owners is both without foundation and contrary to the pro-competitive intent of Congress.

Moreover, comments that would limit the reach of Section 224 to outdoor facilities cannot be countenanced by the Commission. Section 224 does not limit rights-of-way to exterior rights-

¹⁴⁴ 47 U.S.C. § 224(f)(1).

¹⁴⁵ Id.

¹⁴⁶ See Bell Atlantic Comments, at 7; RAA Comments, at 48; SBC Comments, at 4; USTA Comments, at 9.

¹⁴⁷ See, e.g., 43 U.S.C. § 1702(f) ("The term 'right-of-way' includes an easement, lease, permit, or license to occupy, use, or traverse public lands . . . "); 47 U.S.C. § 253(c) ("Nothing in this section affects the authority of a State or local government to manage the public rights-of-way . . . "); id. § 541(a)(2) (authorizing the construction of a cable system over "public rights-of-way").

of-way. A right-of-way is commonly defined as "[t]he right to pass over property owned by another."¹⁴⁸ In this sense, it is equivalent to an easement.¹⁴⁹ As several commenters correctly point out, the term "right-of-way" may alternatively refer to the land over which passage is made.¹⁵⁰ Thus, "right-of-way" may be used to denote both (1) an easement; or (2) the property over which a utility's facilities actually cross.¹⁵¹ With respect to the former definition, it is not at all uncommon for rights-of-way/easements to provide access to and through buildings. The U.S. Court of Appeals for the Second Circuit, for example, resolved a negligence action involving an easement running through a building including its stairways, lobbies, and vestibules.¹⁵² Likewise, the U.S. Court of Appeals for the D.C. Circuit -- in a case involving the scope of a family trust --

¹⁴⁸ American Heritage Dictionary 709 (3d ed. 1994); Black's Law Dictionary 921 (6th ed. 1991).

¹⁴⁹ See 15 Am. Jur. 2d, Easements and Licenses § 7 ("A right-of-way . . . is considered to be an easement."); Black's Law Dictionary 921 (6th ed. 1991).

In light of the dictionary definition of the term "right-of-way," Congress' use of the term "right-of-way" in Section 224 may be understood to encompass both rights-of-way and easements. On other occasions, Congress has defined "rights-of-way" as inclusive of easements. See 43 U.S.C. § 1702(f) ("The term 'right-of-way' includes an easement, lease, permit, or license to occupy, use, or traverse public lands . . ."). Thus, the Commission should reject BellSouth's claim that Congress has "distinguished the legal category 'easements' from the legal category 'rights-of-way' in the Communications Act." BellSouth Comments, at 11.

¹⁵⁰ See American Heritage Dictionary 709 (3d ed. 1994).

¹⁵¹ This latter definition of right-of-way demonstrates that Section 224 "include[s] locations on a utility's own property that are used by the utility in the manner of a right-of-way in connection with the utility's distribution network." Notice, at ¶ 39; see also AT&T Comments, at 17 (same).

¹⁵² See Monaghan v. SZS 33 Assocs., 73 F.3d 1276, 1279 (2d Cir. 1996); see also In re Lamont Gear Co., No. 95-17033DAS, 1997 Bankr. LEXIS 979, at *7 (Bankr. E.D. Pa. 1997)(tenants of building possessed easement permitting them to access areas belonging to others in order to make use of the building's entrances).

noted that a lessor possessed an "easement for parking in an existing garage" ¹⁵³ Thus, the ordinary meaning of the term right-of-way includes access to the interiors of MTEs and other structures.

These commenters also argue that the original Pole Attachment Act was concerned only with outside facilities and that the 1996 Act does not evince any intent to alter this understanding. ¹⁵⁴ The "Real Access Alliance" asserts that "[t]he addition of subsection (f), creating a right of nondiscriminatory access, adds nothing to the meaning of the phrase 'poles, ducts, conduits, and rights-of-way,'" which the "Real Access Alliance" considers to apply to exterior facilities only. ¹⁵⁵ However, in amending Section 224, Congress intended to expand the scope of its coverage to attachments by all providers of telecommunications services. It is reasonable to assume that Congress believed that the corresponding rights-of-way required to accommodate such attachments would also be covered by the provision's existing reference to rights-of-way, which, as shown, can include access to the interior of MTEs.

The "Real Access Alliance" also claims that "if Section 224 allowed cable operators to 'piggy-back' on existing rights of utilities to enter buildings, the cable industry would have sought to apply Section 621(a)(2) of the Cable Act of 1984 to obtain the same right, or at the very least would have pursued similar litigation under Section 224 after the courts rejected those claims." ¹⁵⁶

¹⁵³ See Burka v. Aetna Life Ins. Co., 56 F.3d 1509, 1511 (D.C. Cir. 1995).

¹⁵⁴ See RAA Comments, at 50; UTC/ EEI Comments, at 12-13; Florida Light & Power Co. Comments, at 9-10; SBC Comments, at 4.

¹⁵⁵ RAA Comments, at 51.

¹⁵⁶ Id. at 51. BellSouth argues that federal courts' rejection of cable operators' arguments that use of the term "easement" in Section 621(a)(2) of the Cable Act conferred a right of access to private property forecloses access to MTEs under Section 224. See BellSouth